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No. 97-1337, 97-1356, and 97-1357

In the
Supreme Court of the United States
October Term, 1997

STATE OF MINNESOTA, et al.,
Petitioners,
v.
MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,
Respondents.

COUNTY OF AITKIN, et al.,
Petitioners,
v.
MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,
Respondents.

JOHN W. THOMPSON, et al.,
Petitioners,
v.
MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, LANDOWNERS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves to file the attached brief amicus curiae.[1] Consent to file this brief has been granted orally by counsel for the United States, the State of Minnesota, the landowners, the Minnesota Counties, and the Mille Lacs Band of Indians. The letters of consent received have been lodged with the Clerk of this Court. Requests for consent to file the amicus curiae brief were made to the other parties, but as of the date of filing this brief, no responses have been received.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation has participated in numerous cases before the United States Supreme Court involving the protection of private property rights. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to name but a few.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Amicus seeks to augment the argument in the parties' briefs by arguing that if there are any remaining Chippewa usufructuary rights, the federal government has taken them and the only appropriate remedy for the taking is just compensation. No injunction should issue where such a remedy at law exists, specifically where the equities between the parties weigh heavily in favor of innocent private landowners. In particular, PLF is concerned that the Eighth Circuit's decision ignores the serious harm an injunction will work on innocent property owners.

For the foregoing reasons, PLF requests this Court to grant its motion to file the attached amicus curiae brief.

DATED: August, 1998.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae, Pacific Legal Foundation (Amicus), is set forth in the preceding motion.

OPINION BELOW

The Eighth Circuit opinion below is *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, and is set forth at 124 F.3d 904 (8th Cir. 1997).

INTRODUCTION

In this case, the Mille Lacs Band of Chippewa Indians (Band) has won an injunction from the district court and Eighth Circuit that prohibits the State of Minnesota from enforcing its hunting and fishing regulations against the Band. The court granted the injunctjon based on an 1837 Treaty which gave the Band a temporary right to hunt and fish on lands the Band had ceded to the federal government. Even though the injunction technically applies only to the State of Minnesota, it significantly interferes with the rights and reasonable expectations of third parties, especially private landowners. The lower courts did not take this impact into account. Had they done so, the lower court would have recognized that the appropriate remedy to enforce any remaining usufructuary rights is compensation for the Chippewa Indians and not injunctive relief.

For more than 150 years, the private landowners in the Mille Lacs area and their successors have put their lands to use based on their reasonable belief that the Mille Lacs Band of Chippewa Indians' claims of hunting, fishing, and gathering

rights no longer existed. These rights, temporarily granted under an 1837 Treaty, were terminated in 1850 by an Executive Order of the President of the United States. *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 124 F.3d at 914. The United States government promoted this belief when it asserted over and over again that the 1837 Treaty rights had been terminated. Despite the United States government now recanting its position, its past actions created and promoted the wide-held understanding that the Indians no longer had unique hunting, fishing, and gathering rights. The government held the land open for the public to settle, transferred land it represented as having clear title, and encouraged settlers to invest their sweat and income to make the land productive and valuable.

Not until 1990 did the Band belatedly bring this action to enforce their dormant hunting and fishing rights under the 1837 Treaty. The Band argues that its treaty rights never actually terminated, and contrary to years of expressing a contrary position, the United States sided with the Band in complete disregard for the impact its position had on the private landowners. As presented more fully below, the Band, the United States, and now the lower courts have placed all the burden of resurrected treaty rights on the innocent landowners. This is inappropriate under the facts of this case.

STATEMENT OF THE CASE

In 1837, the United States government and representatives of 12 bands of Chippewa Indians negotiated a treaty which ceded Indian ownership of certain lands in the Upper Midwest to the United States in exchange for money, goods, and supplies. *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 124 F.3d at 909-10. The treaty granted the Band the temporary privilege of hunting, fishing, and

gathering[1] in the ceded territory "during the pleasure of the President of the United States." 124 F.3d at 910.

In 1850, President Zachary Taylor issued an Executive Order which revoked the temporary privileges allowed in the 1837 Treaty. 124 F.3d at 914. Nothing more was said until five years later, when the United States signed a new treaty with the Chippewa.

This 1855 treaty gave to the Chippewa certain reservation land and provided that the Chippewa

> fully and entirely relinquish and convey to the United States, any and all right, title or interest, of whatsoever nature the same may be, which they may now have in, and to, any other lands in the Territory of Minnesota.

Mille Lacs Band of Chippewa Indians v. State of Minnesota, 861 F. Supp. 784, 815 (D. Minn.1994).

The 1855 Treaty was a confirmation of President Taylor's 1850 order revoking the Chippewa hunting, fishing, and gathering rights to further the United States government's policy to promote settlement of Minnesota and the West. Act of Congress, March 3, 1837; State Appellate Appendix to the Eighth Circuit Court of Appeals at 312. To further this policy, the government issued land patents conveying clear title to settlers reserving no Chippewa usufructuary rights. *See, e.g.*, patent issued to landowner's predecessor in interest, John Colson, Landowner's Trial Exhibit 13, A. Vol. 10 at 2911.

Development and use of the lands ceded under the 1837 and 1855 Treaties have gone forward ever since the President's 1850 Executive Order. *See* Landowner's Appendix to the Eighth Circuit at 10955. Much of that development relied on

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[1] This brief will collectively refer to these rights as "usufructuary rights."

the fish and game resources on the ceded lands which fostered the investment and construction of many hunting lodges in the Mille Lacs area. These businesses have long been important recreational resources for the general public. In fact, annual tourism spending directly related to hunting and fishing in the ceded area is estimated at $34,620,000. Landowner's Appendix to the Eighth Circuit at 10948.

After approximately a 100-year dormancy, the issue of what remained of the Chippewa's "usufructuary" rights surfaced in a 1960 adjudication of rights before the Indian Claims Commission. A purpose of the Indian Claims Commission was to give Indians compensation if their property had been taken without just compensation. 60 Stat. 1049 § 2. The Act also gave the Commission authority to consider all equitable claims an Indian tribe or band may have against the United States. *Id.* Yet any remedy was limited to compensation. *Id.* The Chippewa filed a claim with the Indian Claims Commission which awarded the tribe $9,000,000 more than originally received for the ceded lands. The award was calculated to pay them for the highest and best use of the land. 124 F.3d at 924.

Nevertheless, 140 years after President Taylor revoked their usufructuary rights, the Band and some of its individual members filed this action against the State of Minnesota seeking to enjoin the State from enforcing its hunting and fishing regulations against Band members on lands they had ceded to the State under the 1837 Treaty. Several Minnesota counties and landowners intervened in the action to protect their rights.

The United States district court granted the requested relief and enjoined the State of Minnesota from enforcing its hunting and fishing regulations against members of the Chippewa tribe on ceded public lands and on private lands that their owners had kept open to the public. The Eighth Circuit

affirmed the district court and this Court granted the State of Minnesota's Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The State of Minnesota, the counties, and the landowners argue that the 1850 Executive Order, the subsequent 1855 Treaty, the Act admitting Minnesota to the Union as a State,[2] and the Indian Claims Commission award of $9,000,000 terminated the Chippewa usufructuary rights on ceded lands. Amicus, however, will not repeat the parties' arguments. Instead, Amicus will demonstrate that injunctive relief is not an appropriate remedy to vindicate Chippewa treaty rights.

Three principles of equity dictate against injunctive relief in this case. First, injunctive relief should not issue when an adequate remedy at law is available. Even if the Band's treaty rights were not completely terminated by the 1850 Executive Order, the 1855 Treaty, the Minnesota Statehood Act, and the Indian Claims Commission award, the federal government, nevertheless, has taken them. The Band has an adequate remedy in the form of compensation from the United States government for any taking of its usufructuary rights. This Court and Congress have approved of this remedy in other cases where the United States government improperly

[2] Minnesota, like all states, was admitted to the United States "on equal footing with the original states in all respects," and there was no reservation or exception made for the usufructuary rights temporarily allowed to the Chippewa. 124 F.3d at 926. Since those rights existed only during the pleasure of the President, they were "temporary and precarious" and terminated upon the admission of Minnesota to the Union. *Ward v. Race Horse*, 163 U.S. 504, 507 (1896).

abrogated an Indian treaty right and enforcement of the improperly abrogated treaty right would adversely affect the rights of third parties.

Second, before a court issues injunctive relief, equity requires the court to consider the harm to the parties. Consideration of the harms in this case should preclude the issuance of an injunction. Stopping the State from enforcing its fishing and hunting regulations will seriously harm the economic and business interests of the innocent landowners.

Finally, laches precludes relief where a party delays bringing an action to enforce a right and the delay prejudices others. This doctrine applies here because the Band delayed bringing this action for 140 years even though it knew about Minnesota's interpretation of its rights under the 1837 Treaty and knew that Minnesota enforced state hunting and fishing laws inconsistent with Band usufructuary rights. The Band's delay has severely prejudiced landowners who have developed and invested in their property under the belief that the Band would not be asserting any residual treaty claims.

ARGUMENT

I

INJUNCTIVE RELIEF IS IMPROPER BECAUSE THE BAND HAS AN ADEQUATE REMEDY AT LAW

It is a fundamental principle of long standing that a request for an injunction will not be granted as long as an adequate remedy at law is available.

National Farmers Union Insurance Companies v. Crow Tribe of Indians, 471 U.S. 845, 856 n.22 (1985). Thus, a court should not grant injunctive relief for the Band if an adequate legal remedy exists.

A. If the Mille Lacs Band's Usufructuary Rights Survived the 1850 Executive Order and the 1855 Treaty, Then the Wrong the Band Seeks to Remedy by This Action Is the United States Government's Taking of Those Rights

The record in this case shows that the United States government issued land patents that purported to convey unreserved title in ceded Mille Lacs Band lands to many landowners. In making these conveyances, the United States did not reserve any aboriginal rights. For example, the land patent given to one of the current landowner's predecessors in title provided:

> TO HAVE AND HOLD the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging, unto the said John Colson and his heirs and assigns, forever.

Landowner's Trial Exhibit 13, A. Vol. 10 at 2911. Such land patents issued without reservation of any rights are inconsistent with the continuation of any Mille Lacs Band usufructuary rights. When the United States government issued these land patents, it transferred the fee simple estate, which is the highest estate in land. Cornelius J. Moynihan, *Introduction to the Law of Real Property*, 33-35 (1979). The fee simple estate authorized the lands' permanent, exclusive, physical occupation by their new owners which made it impossible for the Band to possess any longer, much less, enjoy its usufructuary rights. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 176

(1979) (the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property).

The United States' issuance of patents without reservation of any Band amounts to the government authorizing the physical occupation of private property (Band's usufructuary rights) which constitutes a taking:

> [A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms that rule, recent cases do not question it, and the purpose of the Takings Clause compels its retention.

Loretto v. Teleprompter Manhattan CATV Corporation, 458 U.S. 419, 426 (1982).

The government's action in this case is also similar to the action taken in *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952 (1991). There, by enactment of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201, *et seq.*, Congress prohibited a mining company from exercising its right to mine a particular coal deposit, because the coal was located in an alluvial valley floor Congress deemed necessary to protect. In essence, Congress appropriated the coal for its own purposes which the Court found to be a taking.

This case is no different conceptionally. By conveying unrestricted ownership of the ceded land to settlers along with the right to exclude all others, including Band members, from gaining access to the land to hunt and fish, the government appropriated the Band's usufructuary property rights for what it considered a more important purpose. It packaged these rights with all other rights embodied in fee ownership as an

incentive for settlers to move into Minnesota. Such an appropriation is a taking.

B. The Band Has a Legal Remedy for the Taking It Claims to Have Suffered: Compensation

Compensation, not injunctive relief, is the remedy for a taking. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987).[3] This remedy has been successfully sought a number of times by tribes. *See Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351 (1926); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); and *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States*, 299 U.S. 476 (1937). Compensation is the appropriate remedy here as well.

The mechanism for seeking compensation is readily available. The Band can seek compensation and money damages from the United States in federal claims court under 28 U.S.C. § 1505,[4] which provides:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any *tribe, band*, or *other identifiable group of American Indians* residing within the

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[3] The record shows that a monetary value can be placed on the 1837 Treaty right to hunt, fish, and gather on ceded Chippewa land. Landowner's Appendix to the Eighth Circuit at 10955. Thus, there is no difficulty in arriving at a dollar figure to compensate the Band.

[4] Individual Native Americans deprived of treaty rights can sue in federal district court or the claims court under the Tucker Act. *See* 28 U.S.C. § 1346(a)(2) (federal district jurisdiction for claims under $10,000).

> territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

(Emphasis added.)

See, e.g., Hurley v. Kincaid, 285 U.S. 95, 104 (1932) (holding that if government action "does constitute ... a taking, the complainant can recover just compensation under the Tucker Act in an action at law" (citation omitted)).

C. Compensation Is Not Only an Available Legal Remedy, It Is the Proper Remedy

This case, of course, does not represent the first time a branch of the United States government has been called upon to balance Indian treaty rights against landowner rights. On most occasions where the rights are in conflict, both the judiciary and legislative branches have endorsed a compensation remedy.

1. This Court Has Approved a Compensation Remedy Rather Than Injunctive Relief to Enforce an Indian Treaty Right

A tribe's right to take fish and game is a compensable property right under the Fifth Amendment. *Grand Traverse Band of Chippewa and Ottawa Indians v. Director, Michigan Department of Natural Resources*, 971 F. Supp. 282, 288 (W.D. Mich. 1995). To protect this property right, this Court has approved just compensation as a remedy where United States government conduct has frustrated Indian treaty rights. For

example, in *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, the Sioux Tribe sought monetary damages for the government's taking of a rock quarry and transferring it to private parties. This Court upheld the lower court's award of monetary relief to the Sioux Tribe. *Id.* at 359. With regard to its decision on the remedy, the *Yankton* Court expressed its concerns for the plight of innocent landowners:

> It is impossible, however, to rescind the cession and restore the Indians to their former rights, because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers.

Id. at 357. The Court concluded that, since the Tribes were entitled to a judgment in their favor but a return of the lands to the Tribes was impossible, the Tribes were "entitled to just compensation as for a taking under the power of eminent domain." *Id.* at 359.

As in *Yankton*, courts regularly tailor remedies to the problems at hand. Monetary relief representing fair value is "just compensation" and constitutionally is the equivalent of tangible or real property. *See, e.g., United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979); *Olson v. United States*, 292 U.S. 246, 255 (1934); *United States v. 131.68 Acres of Land*, 695 F.2d 872 (5th Cir.), *cert. denied*, 464 U.S. 817 (1983) ("the government must, and need do no more than, put the owner in 'as good a position pecuniarily as if his property had not been taken.'" *Id.* at 875 (quoting *Olson v. United States*, 292 U.S. at 255)).

In another case, *United States v. State of Minnesota*, 270 U.S. 181 (1926), the United States sought cancellation of land patents given to the State of Minnesota. The lands subject to the patents should have been reserved for the Chippewa.

This Court ruled in favor of the government and the Chippewa. It ordered the patents canceled "unless the state has sold the lands, and in that event [the United States] is entitled to recover their value." 270 U.S. at 206. While this Court did not specifically address why lands sold to others were not canceled, prejudice to third parties and the availability of an alternative compensation remedy undoubtedly provided the basis.

Such judicial tailoring of an appropriate compensation remedy also took place in *United States v. Sioux Nation of Indians*, 448 U.S. 371, where the Supreme Court addressed tribal claims that the Tribe was entitled to the return of land sold by treaty. Under the Fort Laramie Treaty of 1868, the United States had originally promised that the Sioux reservation, including the Black Hills (and basically all of South Dakota west of the Missouri River), would be set aside for the absolute and undisturbed use and occupation of the Sioux. *Id* at 375-76. The treaty also provided that no cession of land would occur without three-fourths approval of the adult male Sioux. *Id.* at 376. After the discovery of gold in the Black Hills, the United States wanted to trade the Sioux the Black Hills for subsistence rations. Although only 10% of the adult male Sioux approved the new treaty, Congress enacted the agreement anyway, thereby abrogating the Fort Laramie Treaty. *Id.* at 381-83. The Court held that, because the government had acquired the land dishonestly and unfairly, the amount paid for the Black Hills had to be construed as an abrogation of the original treaty. The action of Congress in abrogating the treaty

> effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation,

> and that obligation, including an award of interest, must now, at last, be paid.

United States v. Sioux Nation, 448 U.S. at 424.

Once the abrogation was established, the United States was required to pay the Indians just compensation for the taking of the Black Hills. *Id.* at 423-24. The Indians could not reclaim the Black Hills—even though the United States acted in bad faith—because the land had already been settled and was put to other uses. Under these circumstances it was impossible, unreasonable, and impractical to award the Black Hills back to the Sioux. *Id.* at 377-78. *See also Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (United States government ordered to pay Shoshone compensation for illegally moving Arapaho onto Shoshone lands).[5]

In the case at bar, many of the affected landowners innocently acquired their property which had, as a critical component of its value, the availability of fish and game. Some invested in lodges and resorts where guests came to hunt and fish, reasonably expecting that the State of Minnesota would regulate the taking of fish and game to ensure an adequate supply for future generations. Other property owners opened their land for public hunting with the same expectations and in reliance upon the United States government's representation over 150 years that no Chippewa usufructuary rights remained.

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[5] Lower courts have declined to issue injunctions where innocent landowners are injured. For example, *United States v. Imperial Irrigation District*, 799 F. Supp. 1052, 1069 (S.D. Cal. 1992) (district court refused to enforce an injunction against private property owners because "[a]n injunction would render useless thousands of acres of cultivated farmland to the detriment of innocent farmers who are blameless in this lawsuit and who have worked hard to cultivate desert lands"; monetary relief awarded).

Should this Court decide these rights were never acquired by the treaty, it has, nevertheless, become impractical and unreasonable to recognize them now as they have been taken by the government's authorization of private party occupation. Rather than disrupting the status quo by enjoining the State from enforcing its needed regulations and concomitantly injuring private landowners, this Court should instead direct the Band to refile its claim in the Court of Federal Claims where it can seek an award of monetary damages from the federal government. *See Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 12-14 (1990).

2. Congress Has Recognized That a Compensation Remedy Is More Appropriate to Enforce Indian Treaty Rights Than Injunctive Relief

Oregon Department of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985), is very similar to the case at bar. This Court addressed the question of whether a tribe, which had ceded territory to the United States under a valid agreement, still retained a special right to hunt and fish on the lands free of state regulation. Even though the Court found that the tribe did not retain any special rights, *id.* at 763-64, it proceeded to address the appropriateness of the remedy Congress provided for a survey error that had improperly excluded certain land from the Klamath reservation. *Id.* at 756-57. This Court reasoned that the federal purchase of the improperly excluded Indian land was necessary to settle conflicts between the Indians and rapidly increasing numbers of settlers who had moved into disputed reservation lands. Rather than restore the lands excluded, due to the survey error, to the tribe—an option which would have left intact the tribe's exclusive right to hunt and fish on those lands—Congress chose

to remove the excluded lands from the reservation entirely, leaving them open for all citizens' use and to compensate the tribe for a taking. *Id.* at 771-72.

Such reasoning was earlier embodied in statute when Congress adopted the Indian Claims Commission Act. Act of 1946, Chapter 959, 60 Stat. 1049 (1946). The Act created an Indian Claims Commission to "hear and determine ... claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians." Section 2. The Act provided relief for:

> (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; ... (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant.

60 Stat. 1049 § 2.

Significantly, although the Act allowed equitable claims, it provided only for monetary relief. *See* 60 Stat. 1049 § 2 (providing for the method of determination of the amount of relief). Congress had a reason to limit the relief to payment of compensation: the unfair impact on innocent landowners of making them pay for past wrongs of the United States government. As the District Court of the District of Columbia

noted in applying a law which required the Secretary of the Interior to propose legislative solutions to all Indian claims that the Secretary decided not to litigate:

> Congress was acutely aware that litigation in many instances would be unfair to third parties who had purchased or inherited their property many years ago without knowledge of the Indian claims. The legislators were also troubled by the serious problem of complicity on the part of the federal government in bringing about many improper transfers and encumbrances of Indian land.

Covelo Indian Community v. Watt, 551 F. Supp. 366, 382 (DC Cir. 1982).

Covelo describes a congressional awareness of how litigation decisions could be unfair to third parties who purchased property without knowledge of Indian treaty claims. *Covelo* also noted that Congress was aware that the United States was complicit in bringing about unfair transfers from Indians. Both of those problems are present here. As demonstrated above, the injunction harms innocent third party landowners. Also, the federal government caused this harm when it transferred ceded land without any warning to the innocent settlers and purchasers that their property may still be subject to some unsettled claims.

Accordingly, this Court should direct that any remedy to enforce the Band's treaty claims must be limited to federal compensation.

II

BALANCING THE EQUITIES COUNSELS AGAINST AN INJUNCTION

Before an injunction can issue, the court must balance the equities between the parties. *Burford v. Sun Oil Company*, 319 U.S. 315, 345 (1943). A principle consideration of whether to grant injunctive relief is "whether the harm to the plaintiff outweighs any harm threatened by the injunction." *Savage Industries, Inc. v. Savage Arms, Inc.*, 43 F.3d 714, 719 n.8 (1st Cir. 1994).

To be sure, courts have issued injunctions after balancing the equities but, even on the few occasions courts have issued injunctive relief to enforce an Indian treaty right, they have still provided equitable protections to those who may be adversely affected. For example, in *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 686 (1979), this Court allowed Indian tribes to take only as much fish as necessary to achieve a moderate living.

More recently, the Ninth Circuit in *United States v. State of Washington*, 135 F.3d 618, 640 (9th Cir. 1998), fashioned an injunction to minimize its impact on landowners. The issue was whether specific tribes still had shellfishing rights on state tidelands. The circuit court found rights to exist but still balanced the equities by prohibiting the tribes from benefiting where the landowners had improved the shellfish beds. The *United States v. Washington* court also limited the time, place, and manner of gathering on unimproved beds. However, in this case, the Eighth Circuit employed no equitable considerations. It should have.

A. The Landowners Are Innocent Because the United States Government Represented that the Treaty Rights Are Terminated

Amicus agrees with the state, counties, and landowners that the 1850 Presidential Executive Order and the later 1855 Treaty in which the Chippewa again ceded their lands in exchange for reservation land lawfully terminated the Mille Lacs Band's usufructuary rights. However, even if the order and subsequent treaty did not lawfully terminate those rights, they did have one effect: they created an unmistakable reasonable expectation in the landowners that their lands were free of Chippewa usufructuary rights.

When President Taylor terminated the usufructuary rights in 1850, the United States government had a policy promoting Western settlement and expansion of the nation. Act of Congress, March 3, 1837, 5 Stat. 158, State Appellate Appendix to the Eighth Circuit at 312. In order to promote settlement, all prior claims had to be extinguished so that land could be conveyed to the new settlers. *Id.*

From the 1850's until it took a contrary position in this litigation, the United States government supported this policy and consistently acted as though the Band's usufructuary rights had been terminated. For example, in 1938, President Roosevelt stated that "the hunting, fishing, and gathering privileges guaranteed by the 1837 and 1842 Treaties had been revoked by the 1850 executive order." State Appellate Appendix to the Eighth Circuit at 511.

The record below also shows on many other occasions the United States government expressly told both new settlers and the Chippewa that the hunting and fishing privileges were terminated on ceded lands, and that Chippewa hunting was subject to state law. *See* Opening Brief of Appellant Counties to the Eighth Circuit Court of Appeals at 12-14 and Opening

Brief of Landowner/Appellants John W. Thompson to the Eighth Circuit Court of Appeals at 24.

Consistent with the government's representations, the United States government issued land patents which did not show any reservations of Indian hunting or fishing rights. As the Minnesota Supreme Court has noted,

> patents were granted conveying title to private individuals ... indicat[es] that our government did not construe these treaties as reserving hunting, fishing or any other rights to the Indians.

State of Minnesota v. Keezer, 292 N.W.2d 714, 721 n.10 (Minn. 1980). Thus, the private landowners of ceded Chippewa land are in all respects innocent of any wrongdoing.

B. The Innocent Landowners Reasonably Relied on the Representations of the United States Government and Will Suffer Serious Injury if an Injunction Is Upheld

The landowners heavily relied on the United States' representations. Based upon the expectation that they had clear title to their property, they developed a substantial tourism industry based on hunting and fishing. Landowner's Appendix to the Eighth Circuit at 10948. They invested their lives and money in it.

The record shows that the impact of an injunction on these landowners and the tourism industry is severe. The landowners' economist testified about the extent of the impact on this industry if the Chippewa are given unrestricted hunting rights. He testified that allowing a treaty harvest would cause an annual loss in sales to the tourist industry of $17,310,000 and 863 full-time jobs. Landowner's Appendix to the Eighth

Circuit at 10948. The economist also testified that there would be a $41,290,000 loss in property values. *Id.*

Later, other property owners relied on the United States government's representations and commercially developed their property. For example, some of the landowners developed commercial timber operations. Much of this land is subject to the Minnesota Tree Growth Tax Law. Minnesota Statute § 270.31, *et seq.* Under Section 270.38 subd. 1, a property owner may apply to place his forest land under the Tree Growth Tax Law. The application must agree that

> "while the land is under the tree growth tax law it will be used exclusively for the growing of continuous forest crops in accordance with sustained yield practice and ***will be open to use by the public for hunting and fishing.***"

Id. (emphasis added).

Under the lower court's rulings, Band members may exercise their rights only on public lands and private lands open to public access. Since the forest lands under the Minnesota Tree Growth Tax Law are open to the public, Band members may hunt and fish on them free from state regulations.

When landowners applied to put their property under the Minnesota Tree Growth Tax Law, they did so with the expectation that the public's access for taking fish and game from those lands would be limited by Minnesota wildlife conservation regulations. The landowners did not expect that putting their lands under the Minnesota Tree Growth Tax Law would subject them to unlimited tribal access that could seriously conflict with commercial timber operations. Yet, under the district court's ruling, that is exactly what will happen; these landowners will be unprotected as the state may not limit the Band's access for hunting and fishing.

Why not just remove these lands from the tree growth tax law? In order to take the lands out of the Minnesota Tree Growth Tax Law, the property owners must apply to the local government or the State of Minnesota. ***If*** the application is granted, the property owner will have to pay back taxes and penalties for up to ten years of the time the property was under the Minnesota Tree Growth Tax Law. Thus, landowners with Minnesota Tree Growth Tax Law property can only protect themselves from unregulated hunting access if they pay a substantial penalty. Minnesota Statute § 270.38 subd. 5.

None of these landowners would have invested in their developments had they known that the Chippewa had a right to commercially harvest fish and game on and near their property free of state regulation. Now they are threatened with severe economic hardship because of their reliance on United States government representations and the inaction of the Chippewa. Landowner's Appendix to the Eighth Circuit at 10948. A court of equity should not issue an injunction under these circumstances.

III

THE BAND SHOULD BE BARRED UNDER THE EQUITABLE DOCTRINE OF LACHES FROM ENFORCING ITS USUFRUCTUARY RIGHTS

Under the doctrine of laches, a court should not grant injunctive relief if a party unreasonably delays bringing an action for an injunction and causes prejudice to another party. *Creswill v. Grand Lodge Knights of Pythias*, 225 U.S. 246, 260-61 (1912). "To prove laches, a party asserting the defense must show (1) lack of diligence by the party against whom the defense is asserted and (2) prejudice." *Southside Fair Housing Committee v. City of New York*, 928 F.2d 1336, 1354 (2d Cir. 1991); *Tri-Star Pictures, Inc. v. Leisure Time Productions*,

17 F.3d 38, 44 (2d Cir. 1994) (laches bars injunctive relief where a plaintiff unreasonably delays in commencing an action).

Here, the Band is belatedly claiming a right which it had apparently accepted as no longer existing. For example, the State of Minnesota has been enforcing its fishing and hunting regulations against Band members on ceded lands for more than 100 years. *See* Opening Brief of Landowner/Appellants John W. Thompson to the Eighth Circuit at 4 and 24. Yet the Band did not seek injunctive relief until 1990. It could have done so much earlier. In 1960, the Band made a claim to the Indian Claims Commission for monetary compensation for abrogation of its treaty rights. It received $9,000,000 for the highest and best use of its ceded lands but never raised any arguments for injunctive relief or additional compensation for the usufructuary rights it now claims still to possess. If the $9,000,000 did not compensate for these usufructuary rights, why did the Band fail to seek additional relief?

In reliance on the Band's inaction, Mille Lacs area landowners made substantial commercial and residential investments. For example, they built hunting lodges that must have a reasonable supply of fish and game to attract patrons and survive. The landowners would never have developed their properties in this manner had they known the fish and game could be depleted by the Band. The Band and its members easily could have prevented the landowners' prejudice had they used the Indian Claims Commission opportunity to seek additional compensation or had they brought a separate legal action for enforcement of their treaty rights (if any) prior to private landowners' investments. They never did. Consequently, the Band's action for injunctive relief should

have been, and still should be, dismissed under the laches doctrine.[6]

CONCLUSION

The Eighth Circuit affirmed the district court's injunction against the State of Minnesota preventing it from enforcing its fish and game regulations. This injunction permits members of the Mille Lacs Band of Chippewa Indians to substantially interfere with the property rights of innocent, long-time private landowners in the Mille Lacs area. However, this Court and Congress have recognized that injunctive relief under such circumstances is inappropriate. Therefore, if this Court finds that any treaty rights still exist, it should reverse the

[6] In *United States v. Washington*, 135 F.3d at 637, the Ninth Circuit held that laches cannot apply to defeat Indian treaty rights. The circuit court based its decision on this Court's decision in *Board of Commissioners of Jackson County v. United States*, 308 U.S. 343, 351 (1939). In *Board of Commissioners*, the United States government asserted an Indian claim against a county government that had improperly collected taxes from the tribe. This Court based its decision on the general unavailability of equitable defenses against the United States finding that, "state notions of laches and state statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise." In reaching this holding, *Board of Commissioners* relied on *United States v. Minnesota*, 270 U.S. 181. In that case, this Court considered whether an action substantively brought by the tribes rather than by the United States is subject to laches. This Court's implicit conclusion was that if the tribes bring the action, equitable defenses such as laches are available. 270 U.S. at 194-95. Here, the action is substantively brought by the tribe and, accordingly, laches should apply.

Eighth Circuit's approval of injunctive relief and instead direct the Mille Lacs Band of Chippewa Indians to seek compensation from the federal government in the Court of Federal Claims.

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Respectfully submitted,

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